No. 86-42 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

G.D. SEARLE & COMPANY,

Petitioner,

-vs-

SUSAN COHN and WALTER COHN, her husband, and ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RESTATEMENT OF QUESTION PRESENTED

Petitioner's phrasing of the question presented for review improperly and incorrectly asserts that "hundreds" of cases are concerned with the instant case and erroneously implies that the nonretroactivity principles involved herein are governed by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), rather than *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The question presented for review is more accurately stated as follows:

> Whether the finding that the New Jersey tolling statute violates the Commerce Clause may be nonretroactive when such finding was not foreseeable, retroactive enforcement would forever bar the claims of plaintiffs who relied upon the statute, and defendant cannot demonstrate any significant inhibiting effect on interstate commerce from nonretroactive enforcement.

This Court has already denied petitions for certiorari to the Supreme Court of New Jersey to review the identical question in a related case. *Honda Motor Company, Ltd. v. Coons*, 469 U.S. ——, 105 S.Ct. 808, 83 L.Ed.2d 800 (1985) (Justice Rehnquist, dissenting).

STATUTES AND CONSTITUTIONAL PROVISIONS

Petitioner correctly identifies the pertinent statutes and constitutional provisions, but fails to set forth the amendment to N.J.S.A. 2A:14-22 (referred to in footnote 17 of Petitioner's Brief, p. 19) which was enacted by the New Jersey State Legislature in response to *Coons v. American Honda Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) (*Coons I*). The amended N.J.S.A. 2A:14-22 contains a new second paragraph which provides:

> A corporation shall be deemed represented for purposes of this section if the Corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

N.J.S.A. 2A:14-22, Amended by L. 1984, c. 131, § 1, eff. Aug. 23, 1984 (Supp. 1986).

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COUNTERSTATEMENT OF THE CASE

In January 1974, respondents, Susan Cohn and her husband, Walter Cohn, both residents of New Jersey, filed a complaint in the Superior Court of New Jersey against the petitioner, G.D. Searle & Co. The complaint charged Searle with manufacturing an oral contraceptive which caused Susan Cohn to suffer a stroke in 1963, resulting in permanent paraylsis. On the motion of Searle, a Delaware corporation with its principal office in Illinois, the case was removed to the United States District Court for the District of New Jersey based upon diversity jurisdiction.

Searle then moved for dismissal on the grounds that the action was out of time under the two year statue of limitations, N.J.S.A. 2A:14-2. In opposition, Mr. and Mrs. Cohn argued that the tolling provision of the statute of limitations, N.J.S.A. 2A:14-22, had preserved their cause of action because Searle was a foreign corporation not represented in New Jersey by any person upon whom process could be served. Searle countered by arguing that N.J.S.A. 2A:14-22 -- which had been law since 1949 -- violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Accepting Searle's position, the Hon. H. Curtis Meanor, U.S.D.J. held that the tolling statute violated the equal protection clause and dismissed the complaint as untimely filed. *Cohn v. G.D. Searle & Co.*, 447 F.Supp. 903 (D.N.J. 1978).

Thereafter, both parties appealed to the United States Court of Appeals for the Third Circuit, where the case was consolidated for purposes of argument and dispostion with *Hopkins v. Kelsey-Hayes, Inc.* *Hopkins* also involved a challenge to the New Jersey tolling statute based upon due process and equal protection arguments. While these consolidated cases were pending before the Third Circuit, the New Jersey Supreme Court decided a case involving identical issues. In *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *vacated*, 455 U.S. 985 (1982), that court rejected the constitutional challenges to N.J.S.A. 2A:14-22. Citing, *inter alia*, the decision of the New Jersey Supreme Court in *Velmohos*, the Third Circuit subsequently held that the tolling provision did not violate the Fourteenth

Amendment and the defendants therefore could not claim the protection of the statutes of limitations. *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3rd Cir. 1980).

Following the granting of Searle's petition for writ of certiorari, this Court agreed with the Third Circuit and found Searle's due process and equal protection challenges to the tolling statute to be without merit. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). However, this Court remanded the case to the Court of Appeals for consideration of a new challenge to the tolling statute under the commerce clause, which issue had not previously been considered by the lower courts. *Searle*, 455 U.S. at 414. The Court of Appeals for the Third Circuit then remanded this case and *Hopkins v. Kelsey-Hayes, Inc.*, to the district court for consideration of the Commerce Clause issue. *Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3rd Cir. 1982).

While this case was pending before the district court, the New Jersey Supreme Court determined that the tolling statute, N.J.S.A. 2A:14-22, amounted to "forced licensure" upon unrepresented foreign corporations in violation of the Commerce Clause of the United States Constitution. *Coons v. American Honda Motor Company*, 94 N.J. 307, 463 A.2d 921 (1983) (*Coons I*). However, upon reconsideration, the Court held that the invalidity of the 1949 tolling statute would be applied prospectively only. In *Coons v. American Honda Motor Co.*, 96 N.J. 419, 479 A.2d 763 (1984) (*Coons II*) (in which both Searle and the Cohns participated as *amici curiae*) the court noted that:

> it appears that New Jersey retroactivity law has been inspired by the same considerations that underlie retroactivity theory as developed by the Supreme Court....On the specific issue before us -- whether a civil statute's invalidity is to be applied prospectively or retroactively -- the Supreme Court has developed an equitable balancing test, perhaps best typified by *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed. 2d 296 (1971), and *Lemon v. Kurtzman*, 411 U.S. 192, 36 L.Ed. 2d 151 (1973) (*Lemon II*).

> [96 N.J. at 426, 476 A.2d at 768 (New Jersey citations omitted)].

Discussing the first of the three factors enunciated by this Court in *Chevron*, the *Coons II* court wrote "....*Chevron*, as we have seen, ... tells us that for a decision to be applied retroactively, it is sufficient that it establish a new principle of law, 'either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed.' " 96 N.J. at 431-432, 476 A.2d at 771 (citation omitted). Particularly relevant to the instant case, the court in *Coons II* observed that:

> no appellate court anywhere had even hinted at a commerce clause problem [with N.J.S.A. 2C:14-22] until the Supreme Court's decision in *G. D. Searle v. Cohn, supra*, 455 U.S. 404, 71 L.Ed. 2d 250. Up to that point the only reported mention of commerce clause implications was tucked away in Judge Meanor's footnote in his *Searle* opinion, 447 F.Supp. at 911 n. 17. Hence the declaration of *Coons I* was hardly foreshadowed; and although the case did not literally alter precedent because there was none on the *holding* of the case, it amounted to a "statement" in a matter of first impression -- and thus "new law." [96 N.J. at 433, 476 A.2d at 771 (Emphasis in original)].

It is important to note that even the dissent in *Coons II* agreed with the majority that the decision in *Coons I* established a new rule of law. 96 N.J. at 440, 476 A.2d. at 775.

Next, the *Coons II* court addressed the question of reliance, observing that "[t]he effect of the statute is to give assurance that causes of action against foreign, unrepresented corporations will be preserved," and concluding that "[t]he history of non-action by both [unrepresented] corporations and potential plaintiffs satisfies us that participants in the events before us ordered their affairs in accordance with the tolling statute." 96 N.J. at 433-434, 476 A.2d at 772.

Finally, the court in *Coons II* discussed the effect of prospectivity upon the purpose of the *Coons* I ruling:

> In its starkest terms, [*Coons I*] had as its purpose the outlawing of so much of the tolling statute as violates the commerce clause. Defendant contends that not to apply the ruling retroactively would be to countenance unconstitutionality. But the argument overlooks the balancing of interest and impact, called for by commitment to equitable principles. Those concerns are addressed above--the reliance of plaintiff and those similarly situated, and the absence of any showing that in fact defendant and corporate *amici* suffered a burden borne from a compulsion to register in New Jersey to permit recourse to the statute of limitations. On balance we are satisfied that the purpose of the prior ruling is fulfilled by excluding from the scope of the *Coons I* ruling only those actions already commenced as of August 3, 1983. [96 N.J. at 434, 476 A.2d at 772].

After the decision of the New Jersey Supreme Court in *Coons II*, both *Hopkins v. Kelsey-Hayes, Inc.*, and *Cohn v. G.D. Searle & Co.* were again considered in the United States District Court for the District of New Jersey before the Hon. Stanley S. Brotman and the Hon. Dickinson R. Debevoise, respectively. In *Hopkins*, the defendant's motion to dismiss the complaint under the New Jersey statute of limitations was *denied* by Judge Brotman, expressly based upon the New Jersey Supreme Court's nonretroactivity holding in *Coons II*. (*See* Appendix filed with the Third Circuit, 469 to 471).

However, Judge Debevoise chose not to accord *Coons II* similar deference. *Cohn v. G. D. Searle Co.*, 598 F.Supp. 965 (D.N.J. 1984) (App. 39A). Stating that "the question whether a ruling that New Jersey's tolling statute is unconstitutional should be applied retroactively is a federal, not a state law question" (App. 45A), Judge Debevoise refused to follow *Coons II*, even though he acknowledged that the New Jersey Supreme Court had "discussed both state and federal cases and proceeded

as if state law and federal law on the subject were 'inspired by the same considerations.' " (App. 42A). Judge Debevoise felt that the tolling statute represented such an "impermissible burden" on interstate commerce that its invalidity required retroactive effect. Questioning the applicability of the balancing test articulated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), Judge Debevoise concluded that even under *Chevron* the court would reach the same result.

While the decisions of Judge Brotman and Judge Debevoise were still pending, plaintiff Coons and defendant Honda Motor Co., Ltd. both petitioned this Court for certiorari from the decision of the New Jersey Supreme Court in *Coons I* and *Coons II*. 469 U.S._____, 105 S.Ct. 808, 83 L.Ed.2d 800 (1985). (Justice Rehnquist, dissenting). It is significant that Honda's petition, which presented this Court with arguments identical to those presented by *Searle* in the instant case, was considered and ultimately *denied* by this Court, over the dissent of Justice Rehnquist, who would have granted certiorari to consider cross-petitioner Coons' argument that the tolling statute *did not* violate the Commerce Clause. *Ibid.*

Shortly after Judge Debevoise's decision in *Cohn* and this Court's denial of the cross-petitions for certiorari in *Coons II*, the United States District Court for the District of New Jersey was again asked to determine the retroactivity *vel non* of *Coons II*. In *Love v. Johns-Manville Canada, Inc.*, 609 F.Supp. 1457 (D.N.J. 1985), Chief Judge Clarkson Fisher held that federal law required that the *Coons II* decision be given prospective only effect. *See* 609 F. Supp. at 1467-1468. In so holding, Judge Fisher was well aware that Judge Debevoise had recently reached the opposite conclusion in *Cohn*. Indeed, in discussing Judge Debevoise's "terse analysis," Judge Fisher pointedly states: "Clearly, this Court's analysis must go beyond the talismanic recitation in *Cohn*." *Love*, 609 F.Supp. at 1464. By carefully considering each of the *Chevron* factors, Judge Fisher ruled that the unconstitutionality of the New Jersey tolling statute must only be accorded nonretroactive application.

On appeal of Judge Debevoise's decision to the Third Circuit, respondents Susan Cohn and Walter Cohn argued, *inter alia*, that the district court erred in giving retroactive effect to its ruling that the tolling statute is unconstitutional. The Third Circuit agreed with the Cohns, concluding that the *Chevron* test was appropriate and that the factors relied upon in *Chevron* "point to a holding of nonretroactivity." (App. 12A). Specifically, the Third Circuit found that: 1) the result in *Coons I* was not clearly foreshadowed; 2) the burden from a nonretroactive holding was "largely illusory"; and 3) retroactive application would yield substantial inequitable results. It is from this opinion of the Third Circuit which Petitioner now seeks to appeal.

LEGAL ARGUMENT

POINT I

NO REASON EXISTS TO GRANT CERTIORARI BECAUSE THE THIRD CIRCUIT CORRECTLY APPLIED THE CHEVRON TEST IN CONFORMITY WITH THE DECISIONS OF THIS COURT, OTHER FEDERAL COURTS AND THE NEW JERSEY SUPREME COURT, AND PETITIONER FAILS TO RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW.

As petitioner, Searle must convince this Court that the instant case presents special and important reasons for review on writ of certiorari. Under Supreme Court Rule 17, considerations which may merit review on certiorari include whether a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter, and whether an important question of federal law exists. Petitioner has not, and cannot, sustain its burden of such a showing. Since there is no substantial reason to grant certiorari, Searle's petition must be denied.

A. There Is No Conflict Between The Third Circuit's Decision Here And The Decisions Of Other Federal Courts.

Under Supreme Court Rule 17(1) (a) this Court may exercise its discretion to grant certiorari "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter...." To meet this standard in the instant case, petitioner must show that the Third Circuit's holding of nonretroactive application of *Coons I* conflicts with the holding of another circuit court on the same question. However, as the Third Circuit observed, the *Coons I* decision was one of *first impression:* "we are are unaware of any reported decisions before [*Coons I*] in which

a Commerce Clause objection was raised with respect to any similar statute, although numerous such statutes exist. *See* Annot., 55 A.L.R. 3d 1158." (App. 9A). Since *Coons I* was the first reported decision in which a tolling statute such as N.J.S.A. 2A:14-22 was held to violate the Commerce Clause, it is obvious that the Third Circuit's decision cannot conflict with the decision of another circuit on the issue of its nonretroactive effect.

In tacit acknowledgement of this fact, Searle attempts to convince this Court that the Third Circuit's ruling was based upon either (a) an inappropriate standard of retroactivity (*see* Petitioner's Brief, pp. 13, 16, 17, 18, 19); or (b) the correct standard, wrongly applied. (*See* Petitioner's Brief at 12, 13, 15.) Petitioner combines and confuses these two arguments in an attempt to create the illusion of "conflict" between the Third Circuit's decision and the decisions of other courts. However, Searle's reliance upon selective quotations from inapposite decisions does not obscure the fact that the Third Circuit reached the correct holding, utilizing the proper federal standard.

The appropriate standard was applied. It is well recognized that a court has the power to hold that a rule which overturns precedent will operate prospectively only. *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 360 (1932). The nonretroactive application of federal constitutional decisions in civil cases is governed by an equitable three-factor balancing test enunciated by this Court in *Chevron, supra.* The *Chevron* test weighs the following considerations:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its opera-

> tion." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [404 U.S. at 106-107 (citations omitted)].

Chevron involved an action for personal injuries incurred while plaintiff worked for defendant on a drilling rig located on the Outer Continental Shelf of the Louisiana coast. At the time suit was commenced, the timeliness of the action was governed by the doctrine of laches under admiralty law. While the case was pending trial, this Court held, in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), that state law rather than admiralty law applied to such personal injury actions. Relying on *Rodrigue*, the District Court applied Louisiana's one-year statute of limitations and granted summary judgment for defendant. On appeal, this Court held that the Louisiana statute of limitations should not be applied retroactively. It observed that the holding in *Rodrigue* was quite unforeseeable and to give it retroactive effect would inequitably deprive the plaintiff of any remedy whatsoever, while nonretroactive application would simply preserve the plaintiff's right to a day in court.

Since *Chevron* was reported, all thirteen federal judicial circuits have applied its three-factor test on an *ad hoc* basis in a wide range of civil cases. *See, e.g. Simpson v. Dir., Office of Workers' Comp. Programs*, 681 F.2d 81 (1st Cir. 1982); *Kremer v. Chemical Construction Corp.*, 623 F.2d 786, *aff'd* 456 U.S. 461, *rehearing denied*, 458 U.S. 1133 (1982); *Marino v. Bowers*, 657 F.2d 1363 (3d Cir. 1981); *Ramey v. Harber*, 589 F.2d 753 (4th Cir. 1978); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir.), *vacated and remanded*, 462 U.S. 1127 (1983); *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *MCI Telecommunications, Inc. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Mausen v. E.L. Lien and Sons, Inc.*, 670 F.2d 87 (8th Cir. 1981), *appealed after remand*, 714 F.2d 55 (8th Cir. 1982);

Barina v. Gulf Trading and Transp. Co., 726 F.2d 560 (9th Cir. 1984); *Abbitt v. Franklin*, 731 F.2d 661 (10th Cir. 1984); *Morrison, Inc. v. Donovan*, 700 F.2d 1374 (11th Cir. 1983); *Wachovia Bank & Trust v. Nat. Student Marketing*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Crone v. United States*, 538 F.2d 875 (Ct. Cl. 1979). Similarly, this Court has relied upon its analysis in *Chevron* in civil cases which have come before it since *Chevron* was decided. *See, e.g., Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982); *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*). Far from rejecting the *Chevron* balancing test, as Searle disingenuously asserts (Petitioner's Brief pp. 16-17), this Court and the circuit courts have repeatedly relied upon the balancing approach to relieve litigants of the inequitable results which may arise when existing rules of law are declared unconstitutional. Despite Petitioner's argument, the fact that our courts have sometimes held in favor of retroactivity when applying *Chevron* in a given case clearly does not mean that constitutional holdings are required to be retroactive in *all* cases. As this Court stated in *Lemon II:* "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is fair, and what is workable." 411 U.S. at 200. It is therefore obvious that the Third Circuit is *not* in conflict with other federal courts in applying the *Chevron* test to the issue of retroactivity in the instant case.

However, to create the illusion of conflict, petitioner tries to alter the *Chevron* test by grafting *criminal* retroactivity standards upon it, notably the "clear break" principle discussed in *United States v. Johnson*, 457 U.S. 537 (1982). In *Johnson*, this Court held that a decision construing the Fourth Amendment that was not a "clear break with the past" is to be applied to all convictions not yet final at the time the decision was rendered. 457 U.S. at 562. Searle urges that the *Johnson* "clear break" standard be imposed in the instant case (Petitioner's Brief, pp. 16-17, n. 15), notwithstanding the Third Circuit's unequivocal rejection of Searle's identical argument below:

> We do not read this language ["clear break with the past"] as altering the *Chevron* formulation. The *Johnson* Court expressly differentiated criminal and civil retroactivity, stating that "all questions of civil retroactivity continue to be governed by the standard enunciated in" *Chevron*, 457 U.S. at 563, 102 S.Ct. at 2594. Moreover, the Court did not explicate the "clear break" principle in the civil context except to quote from *Chevron*. Finally, the Court recently stressed the narrowness of the *Johnson* approach in *Solem v. Stumes*, 465, U.S. 638, 104 S.Ct. 1338, 1341 n.3, 76 L.Ed. 2d 579 (184). [App. 8A-9A n.7]

Thus, the instant case is properly governed by *Chevron*, without the gloss established by *Johnson* in the Fourth Amendment context. *See Love*, 609 F.Supp. at 1461.

Searle's similar effort to limit the *Chevron* test to cases of "avulsive change" under *Hanover Shoe*, 392 U.S. at 499 is equally unavailing. (*See* Petitioner's Brief, p. i). The "avulsive change" test, which looks to whether clear past *precedent* is overruled, is only half of the "either...or" analysis which forms the first prong of the *Chevron* test. The other half of the analysis asks whether a decision of a *matter of first impression* was "clearly foreshadowed." *Chevron*, 404 U.S. at 106. Petitioner is in error when it argues that the "avulsive change" standard controls here.

Petitioner further attempts to demonstrate "conflict" between the Third Circuit's decision and Supreme Court decisions by arguing that "when this Court has held that state statutes violate the Commerce Clause, their future enforcement has uniformly been enjoined forthwith, in pending cases and otherwise -- without regard to the *Chevron* criteria." (Petitioner's Brief, p. 18). Searle cites two cases in support of this position: *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), and *Reed v. Campbell*, 54 U.S.L.W. 4646 (June 11, 1986). Addressing the latter of these cases first, it should be observed that *Reed* has *nothing whatsoever* to do with the Commerce Clause and is irrelevant to the instant case because, as this Court observed

therein, "[a]lthough the question in this case is framed in terms of 'retroactivity,' its answer is governed by a rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegimate children." 54 U.S.L.W. at 4647. Obviously, the *Chevron* criteria were not discussed in *Reed*, since *Reed*, by its own terms, was decided on the basis of this Court's heightened interest in avoiding unjustified discrimination agianst children born out of wedlock.

While the other case cited by petitioner at least involved a statute which violated the Commerce Clause, that case is also easily distinguished. In *Lewis*, an out-of-state corporation brought an action for declaratory and injunctive relief from a Florida statute which imposed a blanket prohibition preventing any out-of-state bank holding company from owning or controlling any bank or trust company within the state. Since the issue of nonretroactivity was irrelevant to any actual or potential litigant, this Court had no reason to address that question. Moreover, even if the issue of retroactivity had been relevant in *Lewis*, the fact that this Court was silent on whether its ruling should be applied retroactively would not have required retroactivity in this case, since "each court must make that determination based on an analysis of the case and statute before it." *Allen v. Carmen*, 578 F.Supp. 951, 966 (D.C.Cir.1983). *Cf.*, *Ramey v. Harber*, 589 F.2d at 760, n. 8. (Where cases fail to raise or discuss the question of retroactivity, "we cannot consider them as authoritative precedents on the retroactivity question.") Therefore, it is sophistry for Searle to argue that *Lewis* in any way stands for the proposition that *Chevron* is inapplicable to Commerce Clause holdings such as *Coons I.*

Petitioner's attempts to allege conflict between the decision of the Third Circuit in this case and decisions of the Second Circuit are likewise without merit. As in *Lewis, supra*, the plaintiff in *Loretto Winery Ltd. v. Duffy*, 761 F.2d 140 (2d Cir. 1985) filed an action for injunctive relief on Commerce Clause grounds against a New York statute which permitted the sale of only New York produced wine in supermarkets. Obviously, no decision as to retroactivity was necessary or appropriate in such

a context. The other decision cited by petitioner as conflicting with the Third Circuit is *Industrial Consultants, Inc. v. H.S. Equities, Inc.*, 646 F.2d 746 (2d Cir.), *cert. denied* 454 U.S. 838 (1981). However, this case also offers no support to Searle's position. In *Industrial Consultants*, the Second Circuit gave retroactive effect to an Oklahoma Supreme Court decision which held that the state tolling statute violated the *due process* clause of the Oklahoma constitution. In doing so, the Second Circuit relied upon the fact that under prior Oklahoma Supreme Court decisions, an unconstitutional law is void *ab initio*. 646 F.2d at 749. In contrast, the New Jersey Supreme Court, as the ultimate authority on New Jersey law, made it clear that the equitable balancing tests in *Chevron* and parallel New Jersey cases are paramount to the inflexible and inequitable void *ab initio* principle. *See Coons II, supra.* Moreover, the Second Circuit in *Industrial Consultants* set forth in detail the statutory and common law background which demonstrated that, unlike the present case, the decision of the Oklahoma Supreme Court was *clearly foreshadowed.* Thus, although the Second Circuit did not explicitly refer to the *Chevron* test in its opinion, it is obvious that objective reliance under the first prong of *Chevron* was not shown. For these reasons, petitioner's reliance upon *Industrial Consultants* is misplaced.

The correct holding was reached. It is clear that the Third Circuit reached the correct decision with respect to its application of the *Chevron* test in the instant case. As set forth above at page 8, *Chevron's* first prong requires the court to measure objective reliance by determining if the decision to be applied represents *either* a break with clear past precedent *or* an "issue of first impression whose resolution was not clearly foreshadowed." In analyzing this first factor, the Third Circuit correctly concluded that the *Coons I* holding of invalidity of the tolling statute, N.J.S.A. 2A:14-22, was *not* foreshadowed. It had been unaltered since its passage in 1949 and was traceable, in its earlier forms, to 1820. It was upheld against consitutional attack (on equal protection grounds) in *Lemke v. Bailey*, 41 N.J. 295, 196 A.2d 523 (1963). In fact, the Third Circuit observed that "we are unaware of *any* reported decision before [*Coons I*] in which a Commerce Clause objection was raised with

respect to any similar statute, although numerous such statutes exist." (App. 9A) (emphasis added). Again, it should be observed that *both* the majority *and* the dissent in *Coons II* found that the result in *Coons I* was not clearly foreshadowed. *See* 96 N.J. at 440, 476 A.2d at 755. The court also noted that where, as here, there exists a duly enacted and therefore presumptively legitimate statute, citizens should be able to rely upon it. (App. 10A). *See, Lemon II*, 411 U.S. at 208.

The second *Chevron* factor calls for consideration of whether retroactive invalidation of the statute will further or retard operation of the Commerce Clause principles underlying *Coons I*. Searle desparately tries to show that the Third Circuit's decision requiring Searle to defend against the claim of a permanently paralyzed woman and her husband will impose an undue burden upon interstate commerce by opening the floodgates to "indeterminate numbers" of potential suits. (Petitioner's Brief, p. 19). The alleged burden, according to Searle, is bearing "the costs of defending time-barred suits and possibly paying adverse judgments." (Petitioner's Brief, p. 17).

As with the rest of Searle's argument, this claim rings hollow. The Third Circuit correctly reasoned that any inhibiting effect on interstate commerce vanished once the tolling statute was invalidated, regardless of whether that invalidation was nonretroactive. Thus, the Third Circuit found the burden on interstate commerce from nonretroactive application of *Coons I* to be "largely illusory." (App. 10A). In this regard, it must be stressed that although the tolling statute may have potentially burdened interstate commerce, in actuality it did nothing to deter Searle from profitably and continuously marketing its products in New Jersey. (*See Coons II*, 96 N.J. at 434, 476 A.2d at 772: "[T]he absence of any showing that in fact defendant and corporate *amici* suffered a burden borne of a compulsion to register in New Jersey to permit recourse to the statute of limitations...[convinces us] that the purpose of [*Coons I*] is satisfied by [prospectivity].") Furthermore, the Third Circuit noted that Searle, as well as any other defendant, was free to raise the equitable defense of laches where plaintiff's delay in filing a claim was inexcusable and resulted in prejudice. (App. 11A).

The third *Chevron* factor calls for an examination of the inequities imposed by retroactivity. Weighing this factor, the Third Circuit was mindful that retroactivity would deprive Mr. and Mrs. Cohn of any remedy whatsoever, while prospectivity would preserve their right to a day in court. This consideration was deemed to be of great significance in *Chevron*. *See* 404 U.S. at 108. It is evident that the Third Circuit was aware of the anamalous situation that would ensue if a ruling of retroactivity were reached: a plaintiff in federal court (whether by choice or by removal) would be barred, while a plaintiff in the New Jersey Superior Court would continue to have viable claims under *Coons II*. The fortuity of forum would thus cause totally opposite results, a patently inequitable situtation: "it is a fundamental requirement that like cases should receive like treatment, that there should be no discrimination between one litigant and another except by reference to some relevant differentiating factor. The value of equality is at the root of our system of justice." *Currier, Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201, 237 (1965) (citations omitted).

Finally, it should be observed that an examination of the equities pursuant to the third prong of *Chevron* must not be limited to the immediate parties. "Although the circumstances of particular litigants may be important when they typify general patterns of reliance, case facts per se are not the relevant data in applying *Chevron Oil*....[T]he presumption of retroactivity is outweighed when there are sufficient indications of justifiable societal reliance on a different rule." *Simpson*, 681 F.2d at 86. On this topic, the New Jersey Supreme Court in *Coons II* stated:

> [I]t would be most difficult, if not impossible, to forecast the number of claimants who might be affected by a holding that *Coons I* should be applied retroactively or, as the Attorney General points out, to measure 'the extent and nature of the prejudice to be suffered by those potential plaintiffs who justifiably relied on the validity of the tolling statute.' Despite those difficulties, we conclude that given the nature of this statute, we are justified in presuming that

> because of the tolling feature, many suits may not have been brought against unrepresented foreign corporations. The foreign corporations did not take any action to avoid whatever vulnerability the enactment created; they did not register in New Jersey. The history of non-action by both those corporations and potential plaintiffs satisfies us that participants in the events before us ordered their affairs in accordance with the tolling statute.
>
> Moreover, this conclusion has the virtue of practicability: we cannot construct a workable rule by questioning, in each case, whether the particular plaintiff has successfully demonstrated actual reliance. Some level of generality is required. The result we acheive satisfies that need while at the same time honoring the equitable considerations that must inform our decisions. [96 N.J. at 433-434, 476 A.2d at 772].

In light of the foregoing, the Third Circuit's conclusion that the fundamental equities require a holding of nonretroactivity under *Chevron* was manifestly correct.

B. There Is No Important Question Of Federal Law.

Supreme Court Rule 17(1) (b) allows for certiorari when "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court...." Commenting on the predecessor to Rule 17, Justice Frankfurter stated:

> A federal question raised by a petitioner may be of substance in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [*Rice v. Souix City Cemetery*, 349 U.S. 70, 74 (1954) (citations omitted)].

In an attempt to demonstrate that its petition raises questions of substantial federal importance, Searle claims that "[t]here are hundreds of pending cases in state or federal courts in New Jersey in which the statute of limitations could bar a suit against an out-of-state corporation, absent the interposition of the Tolling Statute." (Petitioner's Brief, p. 19). The only support for this assertion is a reference to the Statement of Interest of *Amicus Curiae* Brinco Mining, Ltd., July 1, 1985 at 2, wherein Brinco is purported to have "identified 60 such cases" in one consolidated federal proceeding. (App. 20A). What Searle fails to state, however, is that Brinco has not demonstrated that a *single* one of the plaintiffs in those cases could have discovered its cause of action against Brinco more than two years before bringing suit. Ironically, this point was previously made by *petitioner itself* in Searle's prior Brief in Opposition to Brinco's Motion for Leave to Participate as *Amicus Curiae*. (Appendix filed with the Third Circuit, pp. 582 to 589).

Obviously, Searle is pressing this petition for certiorari *not* because it involves important questions of federal law, but rather because the Third Circuit resolved the very narrow issues before it in a manner potentially against Searle's pecuniary interests. Such circumstances do not reach the standard for consideration on certiorari, especially where a petition for certiorari on the identical issues has already been denied by this Court in *Coons II*. As this Court has stated, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

In summary, there exists no conflict between the opinion below and the decisions of other federal courts, and petitioner has failed to present any important question of federal law to justify certiorari. This Court is therefore urged to deny this petition for certiorari, as it has denied the previous petition on the identical issue in *Coons II*.

CONCLUSION

For the reasons stated, as well as those set forth in the Brief of Respondent Attorney General of New Jersey, the petition for writ of certiorari should be denied. Thirteen years after the complaint was filed, this personal injury case should now proceed to trial.

Respectfully submitted.

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